

Open Court on Dependency Cases

A Human Rights Perspective

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Introduction

This paper will examine juvenile courts specifically in the arena of child welfare as it relates to abused, neglected, and abandoned children. The scope of this analysis will be limited to the appraisal of whether or not open proceedings in dependency hearings are considered to be a violation of the child's human rights or in the child's best interest. In effect, public access to the American court system is part of our legal past and to consider closing any process of court trials goes against the normative practice.

This paper will examine the legislative and judicial measures taken towards reforming juvenile proceedings, all of which are aimed at better serving the maltreated child. While defining and summarizing dependency hearings, this analysis will overview the psychological impact that abuse, neglect, and abandonment has on the child. All of which shall shed light on why closed proceedings are in the best interest of the child. This review will offer an appraisal of the federal and international legislation as it relates to safeguarding the child in such proceedings.

Additionally, this paper will examine the recent history of California legislation to change its statutes from presumed closed to open and overview the state of Florida's presumed open proceedings and its exceptions. The assessment will then put into plain words the points of the proponents for public hearings and offer the alternative point of view with a final summary of its findings and possible recommendations for judicial best practices and legislative change.

I. Delineation of the Issue

Dependency Action is the legal proceeding governing the adjudication of child abuse, neglect, and abandonment cases. These cases may involve trials to determine: whether the child was abused, neglected, or abandoned, removal of the child from their home into foster care, extensions of foster placement, terminations of parental rights, and other related proceedings until the child has achieved permanency or aged out of care³. A court case involving a minor child in circumstances of abuse, neglect, and abandonment will have several steps. The first step

³Definitions from Florida Statutes Chapter 39 (b) "Child abuse" means abandonment, abuse, harm, mental injury, neglect, physical injury, or sexual abuse of a child as those terms are defined in s. 39.01, 827.04, and 984.03. 39.01 Definitions.

may be to remove the child from the parent[s] custodial care and place the child in the states protective custody. When the child is placed in protective custody and taken from the home, an investigation is conducted to decide whether the child can be safely returned to the home from which they were taken. The court determines whether allegations of abuse or neglect concerning a child are sustained by the evidence and if so whether or not it is legally sufficient to support state intervention on behalf of the minor child⁴. These proceedings are referred to as dependency cases.

In most states, dependency and other juvenile hearings are presumed closed to the public. This goes against the normative in what is known as open justice. The only exceptions in juvenile cases are persons with a direct interest in the trial or those persons in work of the court. The child is singled out by law for special attention. The legal framework set forth distinguishes between the adult and the child in a physical, psychological and social context. Adults are responsible for themselves, children by all accounts are considered to be dependent.⁵ There are laws written to consider the safety, placement and the protection of the child's rights with the consideration to serve the best interest of the child. Children are in need of direct, personal, and continuous care from adults who are personally committed to the responsibility of parenting them. Thus, "the state seeks to assure for each child membership in a family with at least one such adult whom the law designates "parent".⁶ The manner in which the state invokes its responsibility to both protect and serve the most vulnerable children in court has been at the center of a controversial debate in dependency matters.

⁴ Barbara Flicker, May 24, 2005, Best Practices in Child Protection Courts apps.americanbar.org/child/rclji/bestpractices.doc, last accessed 3/29/2012

⁵ Goldenberg, Herbert, Goldenberg, Irene, Solnit, Albert J., & Freud, Anna, Publisher Cengage Learning, Family Therapy an Overview (2008)

⁶ 2011 Florida Statutes, Chapter 39, Proceedings Relating to Children, 39.902, Definitions.—As used in this part, the term: (1) "Domestic violence" has the meaning set forth in s. . (2) "Domestic violence center" means an agency that provides services to victims of domestic violence, as its primary mission. (3)"Family or household member" has the meaning set forth in s. . History.—s. 2, ch. 78-281; s. 2, ch. 79-402; s. 1, ch. 82-135; s. 71, ch. 83-218; s. 1, ch. 84-128; s. 2, ch. 84-343; s. 17, ch. 92-58; s. 19, ch. 93-200; s. 30, ch. 94-134; s. 30, ch. 94-135; s. 137, ch. 97-101; s. 114, ch. 98-403; s. 3, ch. 2002-55. Note. Formers. 409.602; s. 415.602. , last accessed 3/29/2012

The courts and the child welfare system in an attempt to achieve the common goal of the “best interest of [for] the child”, has taken many different approaches in developing and working policy and legislation which has lead to different levels of public access⁷.

Although it may seem rather obvious to say we must consider the best interest of the child in all juvenile proceedings, it is especially important to reiterate that the child’s interest should be paramount in dependency proceedings. It is a poignant day when the government is forced to take on the role of the parent. It is important to reiterate that when the state intervenes it does in the “best interest of the child”. When this occurs it is often times the child loses.

Best Interest of the Child – “across the board, it is the role of the judge to make a final decision based on what is in the best interest of the child. In order to do this, he or she must consider the positions and arguments of the state social services attorney who brought the case, the parent alleged to have abused or neglected the child and who is represented by an attorney, and as we are advocating for here, the child victim, whose position should be presented through an attorney and considered by the judge in making this best interest determination”.⁸

Children who suffer from abuse, neglect, and abandonment have prolonged problems which are associated with their psychological, emotional, and cognitive functions. Furthering a delayed acquisition of life skills as a result of issues plaguing their long-term development, and detachments of this kind can sometimes have an immediate effect but often times create long-term undefined problems.⁹ Kids need to be healthy, educated, safe, housed, fed and supported to strive, thrive, and fulfill their God-given potential¹⁰.

⁷ Goldenberg, Herbert, Goldenberg, Irene, Solnit, Albert J., & Freud, Anna, Publisher Cengage Learning, Family Therapy an Overview (2008)

⁸ Id 7

⁹ Oswald, Heil, Golbeck, 2009, History of maltreatment and mental health problems in foster_... , last accessed 2/29/2012

¹⁰ Goldenberg, Herbert, Goldenberg, Irene, Solnit, Albert J., & Freud, Anna, Publisher Cengage Learning, Family Therapy an Overview (2008)

Family reunification is the ultimate goal of the court, “The state seeks to rehabilitate and preserve the family if possible, not to punish anyone”¹¹. The family unit is considered to be most sacred in the eyes of the judicial process especially as it pertains to juvenile and dependency proceedings. “The Family Preservation and Family Support Services Program” was passed by the United States Congress in 1993, to provide flexible funding for community-based services which focus on child abuse prevention and to help parents whose children were at risk of being removed. It is authorized through Title IV-B, subpart 2 of the Social Security Act. This legislation also created the Court Improvement Program which enabled state courts to assess innovative methods of improving family court performance”.¹²

There is no denying the child welfare system has its own set of problems. However public access to all dependency trials does not equate a remedy to the system or a push towards legislative reform. The California law makers would beg to differ, as Los Angeles County recently passed amended bill 731 (AB731), establishing open dependency proceedings to the public.

Ultimately, while there are many fundamental problems that plague dependency proceedings which need to be addressed, this is not a good solution to deal with them. California and Florida statutes allow the general public or other persons who do not have a “direct interest” in the case to be admitted into a dependency proceeding only under special circumstances and certain types of trial hold automatic restrictions in accordance with the state statutes.

In every aspect of any juvenile proceeding the child’s best interest [in, for, and of] is paramount. While the average person may not have heard of dependency court the assumption is, if a minor child is involved in a court proceeding, that child is suspected of criminal activity. A minor child, which is defined as any persons under the age of eighteen, in any juvenile court should have their own advocate. Criminal proceedings where the child is implicated requires by law the child have legal representation, but in matters of dependency this is not always the

¹¹ Kathleen S. Bean, Changing the Rules: *Public Access to Dependency Court*, 79 Denv. U. L. Rev. 1, 43 (2001).

¹² Edward Zigler and Nancy Hall, *Child Development and Social Policy* (Englewood Cliffs, N.J.: Prentice-Hall, 2000), p. 42.

circumstance. Every child involved in a dependency case, closed or open, should have either legal representation or a Guardian Ad-Litem.¹³

However, closed proceedings are counter-productive to what is historically the foundation of our justice system. Open court proceedings are useful in combating judicial misconduct, monitoring unfair proceedings, and informing the public of those persons who are a potential danger to the community. It is a flight of the imagination to look at closed proceedings and its isolated effects as detrimental to all involved. The past has shown in presumably closed juvenile criminal proceedings that some children receive very little punishment for their crimes while others face exaggerated consequences. This only advances the mystery surrounding juvenile court, further questioning the issue of confidentiality especially when the minor has made themselves a danger to the public.

It is a reality that the system does not work. Juvenile prisons and detention centers as well as closed or open courtrooms say nothing for the rehabilitation of youth, thus developing the adult criminal. Opening the doors to dependency trials is a debate which will not be concluded in this thesis but it will be surmised to cover both points of view.

II. The Conflicting Claims

Proponents for Closed Proceedings

Public access to court proceedings is an active symbol of our American justice system. It encourages truthfulness of all parties and holds the justice system accountable.¹⁴ Controversy over open juvenile proceedings has provoked debate even before the first juvenile case was heard in Chicago back in 1899.¹⁵ However, it remains that open court is not the standard in juvenile trials. Part of the reason for this is dependency cases bring the private lives of these family members who are victims into the public eye.

Very often children are very fearful of a cold courtroom. Many times the faces these children see in court are representative of the very people who removed them from their homes.

¹³ A Guardian Ad-Litem is an individual appointed by the court to represent the child's best interest in court proceedings. The GAL may or may not be an attorney.

¹⁴ Southern Area Consortium of Human Services (SACHS), Literature Review: Open Juvenile Dependency Courts, Bean, 2001

¹⁵ Id

They seem as though they are out to get the only parents a child has ever known. In dependency matters a closed hearing can offer a more informal environment for all parties involved which creates a better environment to administer the social work which is needed to protect the child from further trauma. It has been argued that the need for confidentiality is one that is more desired in matters of dependency over delinquency.

Dependency cases are very serious and complex. State and federal laws require courts to move quickly in the determination of each child. When alleged offending parents are faced with criminal charges and children are removed from the home, the value placed on privacy in these matters can be the dividing line between a breakdown and a somewhat expected response from a child who has suffered abuse, neglect or abandonment. Confidentiality must be given high priority in these types of cases and closed proceedings can guarantee privacy to a larger extent than open courtrooms. Non-discretion is of the utmost consequence for the child. Stress levels in children can create a loss of their sense of security which manifests itself ways such as having a short attention span. This may lead others to believe their behavior is symptomatic of more serious medical or mental health disorders.

According to the Southern Area Consortium of Human Services and its 2011, literature review of Open Juvenile Dependency Courts; “Dependency courts are closed in six states and presumably closed in twenty-one states. Within those states which hold a presumed closed status, hearings are open to the public or specified persons under the state statute, some states having less restrictive language than others”.¹⁶

Here are the national arguments in opposition of open courts:

- Emotional Harm: Already victimized children will be further victimized by public exposure.
- Interfere with rehabilitation: “Exposing ...families’ dysfunctions to the public will not serve and may actually deter [the] goal”¹⁷ to rehabilitate and reunite families¹⁸.

¹⁶ The Advocacy Inst., and First Star, 2008

¹⁷ Southern Area Consortium of Human Services (SACHS), Literature Review: Open Juvenile Dependency Courts, as cited NCSC, 2001, p.8

¹⁸ Southern Area Consortium of Human Services (SACHS), Literature Review: Open Juvenile Dependency Courts

- Increase reluctance to report: With fear that family, friends and the public may “learn of their most shameful experiences,”¹⁹ children will be less inclined to report abuse²⁰.
- Increase exploitation: “Special interest groups and disenfranchised family members [can] use the media to further their purpose”²¹
- Decrease adult accountability: Allowing adults the option to plead ‘no contest’ defeats the goal of holding adults accountable. Adults will therefore be less likely to successfully rehabilitate, as they have not accepted fault²².
- Biased closures: Potential abuse of closures under “exceptional circumstances” in order to protect prominent members will perpetuate mistrust in the system²³.
- Irresponsible reporting: It is extremely difficult to ensure that children’s identifying information is not published and it is unrealistic “to expect the media to fully report on cases therefore an accurate picture of cases and system is unlikely²⁴”.
- Sensational cases will skew perception: Cases reported by the media will most likely reflect those that may appeal to the public. This will skew perception of the system as a whole²⁵.
- Consistent reporting unaffordable: Because assigning a reporter to cover juvenile cases on a regular basis may not be economically feasible, novice reporters unfamiliar with child protection hearings “may misreport cases because of insufficient familiarity with the procedures and substantive events taking place”²⁶.
- Difficult to monitor media: Successfully enforcing any sort of accountability system for violation of disclosure agreements is close to impossible with the extensive amount of media and social media outlets²⁷

¹⁹ Southern Area Consortium of Human Services (SACHS), Literature Review: Open Juvenile Dependency Courts as cited (NCSC, 2001, p.8)

²⁰ Southern Area Consortium of Human Services (SACHS), Literature Review: Open Juvenile Dependency Courts

²¹ Id 20

²² Id 20

²³ Id 20

²⁴ Southern Area Consortium of Human Services (SACHS), Literature Review: Open Juvenile Dependency Courts (NCSC, 2001, p. 9)

²⁵ Id 20

²⁶ Southern Area Consortium of Human Services (SACHS), Literature Review: Open Juvenile Dependency Courts as cited as cited (Patton, 2005, p.322)

²⁷ Southern Area Consortium of Human Services (SACHS), Literature Review: Open Juvenile Dependency Courts as cited (Patton, 2005).

Special claims by foster youth are being brought forth. In November of 2011, according to the Los Angeles Times, dozens of foster youth gathered in protest of the then proposed legislation to open juvenile dependency hearings²⁸. Garret Therolf reports there is a fifty-fifty split between the union which represented social workers and non-profit juvenile lawyers on whether or not the county should opening dependency proceedings to the public.

“Lucias Bouge, a 19-year-old former foster youth recounted: “Kids laughed at me because of the way I talked, because my family was poor and because I as different from everybody else. Now imagine my classmates seeing my family life blasted in the morning paper...”

Statements like this one only enhance the argument in favor of confidentiality. There have been some instances where the power to close courtrooms and seal records has been asserted on the part of Judges in an effort to regain control over the press in reporting criminal procedures. The same efforts should be made when courts are presumably open in matters of dependency.

We have all watched the horrific stories on the news of children who have been repeatedly, severely abused and neglected by parents who clearly were not prepared to govern themselves accordingly, much less be responsible in the custodial care of a minor child. These terrible stories reported by the media change everyone who hears them. When these cases are splashed across our evening news and typed on our weekly blog sites we are all appalled and think... “What horrible people... how is it they were allowed to do this for so long...?” The truth is there is only one side that is told in the media and it is often times sensationalized. There is continuous question as to whether or not the media when allowed to sit in open court dependency hearings, actually play a role in whether or not the victim and the offender will perjure their testimony.

Proponents for Open Proceedings

The government holds the most power in dependency court. It is the State that takes the child away from the parents and is the driving force when placing children with complete strangers. Oftentimes, the trauma sustained before and after the child has been removed from a

²⁸ Los Angeles Times Article, “Foster Children Protest Pulic Juvenile Dependency Hearings”; THERolf, Garret, Nov. 21, 2011

detrimental environment can lead to severe post traumatic stress disorder (PTSD) in children²⁹. It is the State which strips the parents of their liberties to direct and control the rearing of the child.

Most families who enter the dependency system are new to the functions of the court while the people on the other side are not. Judges, attorneys, and social workers have all been here before and understand the ins-and-outs of the system. A social worker will understand why it takes a long time for a child to be returned to a parent's custodial care when the parent is lost to the process. Some would argue that this is an unfair advantage on the part of the State. However, we must look at the law; the State has a positive obligation to protect those persons who are in danger while providing adequate facilities and programs which aid in the prevention and assurance of services³⁰. Once a child has been victimized the State holds a negative obligation to intervene; it is at this point, in the interest of fair justice that trials and specifically dependency hearings are held in open court.

National Arguments in Favor of Open Courts³¹:

- Increased visibility/ accountability: System "lacks accountability because it is a closed system"³². Visibility will allow for public scrutiny³³.
- Community inclusion: An open system allows for the opportunity of more informed policy decisions by taxpayers that are more closely based on "community standards"³⁴.
- Lead to reform: Educating the public on the deficiencies of the child welfare system will lead to reform³⁵.

²⁹ Kendall, Philip C., Treating anxiety disorders in children: Results of a randomized clinical trial, *Journal of Consulting and Clinical Psychology*, Vol 62(1), Feb 1994, 100-110. doi:. Investigated a psychosocial treatment for 47 Ss (aged 9–13 yrs) with anxiety disorders. A 16-session cognitive-behavioral treatment was compared with a wait-list condition. Outcome was evaluated using child self-report, parent report, teacher report, cognitive assessment, and behavioral observations. Pretreatment–posttreatment changes and maintenance of gains at 1-yr follow-up were examined. Results revealed that many treated Ss were found to be without a diagnosis at posttest and at follow-up and to be within normal limits on many measures. The child's perception of the therapeutic relationship and the therapist's perception of parental involvement were measured but were not related to outcome. Discussion focuses on characteristics of effective child therapy and the need for further research on treatment components and alternative treatment methods. (PsycINFO Database Record (c) 2010 APA, all rights reserved)

³⁰ Dr. Sigfried Wiessner, Class lecture, Introduction to Human Rights Law, St. Thomas University School of Law, Fall 2011.

³¹ NCSC, 2001

³² Children's Advocacy Institute, University of San Diego School of Law, Children's Advocates' Roundtable, 2004, p. 1. Last accessed 3/3/2012

³³ Southern Area Consortium of Human Services (SACHS), Literature Review: Open Juvenile Dependency Courts

³⁴ Id 33

- Proceedings involving child abuse already open: Adult criminal proceedings, which are open to the public, deal with issues central to Children in Need of Protection (CHIPS) and Termination of Parental Rights (TPR) proceedings³⁶.
- Provide uniformity: Will decrease confusion and uncertainty by professionals regarding what can be shared under confidentiality protections.³⁷
- Less restrictive communication: Allows professionals the flexibility to communicate with the public in order to explain actions and clarify misinformation.

In an open letter to the Honorable Michael Nash, Presiding Judge of Juvenile Court, Juvenile Division, Superior Court of Los Angeles County; Edward Opton, Attorney at the National Center for Youth Law³⁸ wrote the following regarding opposition of open courts:

“The objectors to a juvenile court that would be presumptively open, but closed upon proper showing of good cause, without exception ignore the reasons that in democracies courts normally are open to the public. The objectors point to a plethora of potential harms, almost all hypothetical, that might occur if dependency courts were open; but as to the benefits of open courts they say not a word.

I suggest that the objectors are failing to take notice of a thousand years, or more, of history in which the openness of the judicial system has developed hand in hand with government of, by, and for the people, while closed courts, secret courts, Star Chambers have been the tools of dictatorship, oligarchy and arbitrary rule.”

While open court may shed light onto a deteriorating system and substandard level of social

³⁵ Id 33

³⁶ Southern Area Consortium of Human Services (SACHS), Literature Review: Open Juvenile Dependency Courts as cited NCSC, 2001

³⁷ Children's Advocacy Institute, University of San Diego School of Law, Children's Advocates' Roundtable, 2004, p. 1 . Last accessed 3/3/2012

³⁸ Edward Opton is of counsel to NCYL. He is the first attorney to work long-term with NCYL after retiring from full-time practice. Since January 2007, he has been working principally with Senior Attorney Bill Grimm on Child Welfare issues. A graduate of UC Berkeley School of Law, Opton was an employment and labor lawyer for the University of California from 1981 to 2006. Earlier, in his first post-law school job, he was an associate at Morrison & Foerster in San Francisco. Law is Opton's second career. A graduate of Yale, he received his Ph.D. in clinical psychology from Duke University. He did research on psychological stress at UC Berkeley in the 1960s and '70s and was Associate Dean at The Wright Institute, a graduate school of psychology in Berkeley. National Center for Youth Law, 405 14th St., 15th Fl., Oakland, CA 94612, (510) 835-8098

work, it offers nothing in the determination of what is in the interest of the child. Dependency cases cannot be solved in one sweep of justice. The same can be said for children. One standard in policy and procedure cannot solve the problems of child welfare. The child must be considered in context. A contextual ideal that considers the right to privacy, life, and good mental health is vital to the child's best interest.

Although initial federal law governing dependency court expressly included the provisions addressing confidentiality, legislation was unclear concerning the requirements relating to access to open court proceedings. Following the 2003 and 2005 amendments to the Child Abuse Prevention and Treatment Act (CAPTA) and Title IV-E respectively, federal laws adopted provisions for increased clarification on the authority to determine policies relating to public access of dependency court proceedings³⁹. Determination was left in the hands of the state.

III. Past Trends and Decisions

While I would argue that open proceedings in dependency cases should be presumed closed in consideration of the best interest of the child; there is no denying that open access to courts is constitutionally a practice that has been part of the American justice system. However, we must consider in most cases of dependency the child is the victim and there are laws which govern the rights of victims not only on a national level but at the international level as well.

While the United States constitution contains no express right to privacy, we must look even further at the Bill of Rights and the intention of its framers, in their labors, to protect assured aspects of privacy. "Such as the privacy of beliefs, First Amendment; the privacy of the person and possessions as against unreasonable searches, Fourth Amendment, and the Fifth Amendment's privilege against self-incrimination, which provides protection for the privacy of personal information"⁴⁰.

In addition, the Ninth Amendment states that the "enumeration of certain rights" in the Bill of Rights" shall not be construed to deny or disparage other rights retained by the people."

³⁹ Southern Area Consortium of Human Services (SACHS), Literature Review: Open Juvenile Dependency Courts

⁴⁰ Southern Area Consortium of Human Services (SACHS), Literature Review: Open Juvenile Dependency Courts as cited Linder, 2012

Although the Bill of Rights does not explicitly mention “privacy”, Former Justice William O. Douglas noted in his opinion that “the right was to be found in the “penumbras” and “emanations” of other constitutional protections” as he related it to *Griswold v. Connecticut*, 381 U.S. 479 (1965). The Ninth Amendment has often been implicit in its justification for broadly reading the Bill of Rights to protect privacy in ways not specifically provided in the first eight amendments⁴¹

As early as the mid 1300’s in England and to the America’s, the value of open access to justice has proven to have beneficial outcomes. The only consideration to private or closed proceedings was the criminal offense of minor children and proceedings were held as private in an effort to offer rehabilitation. Even as early as the late 1800’s in Chicago, when the first dependency case was brought to court the privacy and confidentiality of the child was considered because of the delicate nature of the victim and witness testimony.

Federal Child Welfare Legislation

In the United States the primary child welfare legislation can be found at state, federal, and international levels. Although states have the power to regulate their judicial policy and procedures all state courts are obligated to operate under Federal jurisdiction, therefore obligating themselves to the international community as well.

Some very important Federal legislation specific to child welfare, which must be applied judicially when hearing dependency cases are: the Indian Child Welfare Act, Adoption Assistance and Child Welfare Act (AACWA), Multiethnic Placement Act, Adoption and Safe Families Act, Fostering Connections Act, and the Interstate Compact on the Placement of Children.

The importance the federal government stresses on policy, which has been the foundation for the courts and its supportive welfare agencies, has shifted over time. As the mission of each member organ of the system has changed, its primary source of funding has shifted as well.

⁴¹ Id 40

Child welfare and its judicial system's main source of funding transferred from federal to state. The change in structure has set forth a change in policy. Shifting the importance placed on a variety of issues within the child welfare system.

The primary job of regulating local child welfare systems and its courts became the responsibility of the State. Some of these variations include mandatory reporting, social services and its accommodations, as well as the policies and procedures which govern foster care. The sole determining factor of open or closed judicial proceedings in dependency cases, not including any criminal charges, has been at the resolve of State legislation which is subject to federal jurisdiction.

For instance the Child Abuse Prevention and Treatment Act (CAPTA) of 1974 was the first national legislation Congress passed with regard to child maltreatment. Reasonable efforts and due diligence procedures were set in place to prevent the unnecessary removal from parental custody; case plans and judicial reviews⁴² (periodic court visits) were set in place to facilitate in the improvement of state courts. These procedures were the result of the 1993 Family Preservation and Support Act. Most recently, the Adoption and Safe Families Act of 1997 brought about the expedited permanency goals with an emphasis toward family reunification, formal and kinship adoptions⁴³, or legal guardianship.⁴⁴

The CAPTA outlines rules of confidentiality: "in order to protect the rights of the child and of the child's parents or guardian".⁴⁵ It did not clearly offer rules regarding access to court proceedings. Although the 2003 amendment expressly addressed the issue of court access, stating in fact, that:

⁴² Specific to Florida Rules of Juvenile Procedure: Supreme Court of Florida Judicial Rule 8.415 Judicial Review of Dependency Cases

⁴³ Kinship adoptive families are formed both by choice and often out of necessity. As defined by adoptionissues.org/kinship_adoption.html, last accessed 3/27/2012 and Nancy Boyd-Franklin, 1989, *Black Families in Therapy*.

⁴⁴ Flint, Jennifer (2006). *Who Should Hold the Key? An Analysis of Access and Confidentiality in Juvenile Dependency Courts*. bepress Legal Series. Paper 1246, <http://www.childwelfare.gov/systemwide/courts/confidentiality.cfm>, last accessed 3/29/2012

⁴⁵ Flint, Jennifer (2006), p.5, *Who Should Hold the Key? An Analysis of Access and Confidentiality in Juvenile Dependency Courts*. bepress Legal Series. Paper 1246, <http://www.childwelfare.gov/systemwide/courts/confidentiality.cfm>, last accessed 3/29/2012

“[n]othing in subparagraph (A) shall be construed to limit the State’s flexibility to determine State policies relating to public access to court proceedings to determine child abuse and neglect, except that such policies shall, at a minimum, ensure the safety and well-being of the child, parents, and families.”⁴⁶

This “provision [made] it clear that states have discretion to establish their own policies on public access to child abuse and neglect court hearings”⁴⁷

Clearly, the State holds an earnest obligation to consider the mental, physical, and emotional health of the child when proposing State legislation on presumably open dependency hearings.

The Title IV-E of the Social Security Act includes rules of confidentiality regarding abuse and neglect records, which is regulated by federal funding provided States adhere to its provisions.⁴⁸ However, once again, it lacked specificity on guidelines regarding open access to court proceedings.

In June of 1998, the Children’s Bureau “issued a policy statement advising states that they run a risk of losing federal funds if they open dependency proceedings because of the apparent conflict with federal confidentiality requirements”⁴⁹

In response the Conference of Chief justices and others petitioned Congress asking for policy determination to be left with the State, as a matter of contention remedial measures included policies directed at the safety and well being of the children, parents and the family.⁵⁰

⁴⁶ Flint, Jennifer (2006). p.6, Who Should Hold the Key? An Analysis of Access and Confidentiality in Juvenile Dependency Courts. bepress Legal Series. Paper 1246,

<http://www.childwelfare.gov/systemwide/courts/confidentiality.cfm>, last accessed 3/29/2012

⁴⁷ Southern Area Consortium of Human Services (SACHS), Literature Review: Open Juvenile Dependency Courts, as cited NSCS, 2004, p.5

⁴⁸ Tucker, L. (2006). Open or Closed: An overview of the current opinions and realities of opening juvenile court deprivation proceedings. Retrieved from www.childwelfare.net, last accessed 3/28/2012

⁴⁹ Tucker, L. (2006). P.3, Open or Closed: An overview of the current opinions and realities of opening juvenile court deprivation proceedings. Retrieved from www.childwelfare.net, last accessed 3/28/2012

⁵⁰ Child Welfare League of America, Summary & Analysis of Final Reconciliation Bill, available at <http://www.cwla.org/advocacy/fostercare060201.htm>, last visited Feb. 26, 2012

Additionally, the AACWA does not specify for the state whether court proceedings may be open to the public.⁵¹

California

The California Senate passed SB1391, back in 1999, which made provisions for dependency proceedings. It also afforded the courts the right to hear motions to close proceeding providing the interest of the child was at risk. However, this bill died in the Assembly's Appropriation Committee for unknown reasons. Then in 2004, the Assembly introduced AB2627, to change California's presumed closed dependency proceedings from closed to open.

This bill was similar to its counterpart in 1999 with a few differences: there were pilot programs to be developed and implemented in three separate counties, the judge would entertain and grant motions to close upon finding that admitting members of the public would be detrimental to the child's interest. It also listed provisions where the court would be required to caution the public from revealing identifying information about the minors in the case. Furthermore the bill would require the child welfare department to communicate with the public regarding dependency proceedings. During deliberation there were numerous questions raised similar to the questions raised in 1999.⁵²

With the California Senate citing: "inconclusive empirical regarding the 'potential benefits' of an open court system"⁵³ and hesitated "to make a change of this magnitude without greater certainty that the action is in the best interest of children in dependency courts",⁵⁴

In December of 2010, assembly bill AB 73 was introduced to change California's dependency courts' status from presumably closed to presumably open.⁵⁵ The bill cites the following points: open proceedings will show the benefits of increasing accountability by child

⁵¹ Flint, Jennifer (2006), p.7, Who Should Hold the Key? An Analysis of Access and Confidentiality in Juvenile Dependency Courts. bepress Legal Series. Paper 1246, <http://www.childwelfare.gov/systemwide/courts/confidentiality.cfm>, last accessed 3/29/2012

⁵² Flint, Jennifer (2006). Who Should Hold the Key? An Analysis of Access and Confidentiality in Juvenile Dependency Courts. bepress Legal Series. Paper 1246, ; last accessed 3/29/2012, and Tucker, L. (2006). Open or Closed: An overview of the current opinions and realities of opening juvenile court deprivation proceedings. Retrieved from www.childwelfare.net, last accessed 3/28/2012

⁵³ ; AB 73 (California legislature- 2011-2012), last accessed 3/21/2012

⁵⁴ Id

⁵⁵ See Appendix A for bill AB 73 (California legislature- 2011-2012)

welfare system and providing education to the public.⁵⁶ It cites safeguarding measures in allowing judicial discretion to close individual cases upon finding it is in “the best interest of specific children”.⁵⁷ The bill does not allow public access to court files. Judge Michael Nash was a strong supporter of the proposed bill and recently satisfied his wishes to allow Los Angeles County to serve as a pilot program for AB 73.

Proponents for open dependency cases in California included many juvenile court judges with the opposing side being the social workers’ union and the National Association of Council for Children.⁵⁸ The state of California⁵⁹ with the exception of three of its counties including, Los Angeles County, currently hold presumably closed dependency proceedings. There are twenty additional states with a presumed closed status. The only states that specifically hold closed dependency proceedings are Arkansas, Connecticut, Delaware, Louisiana, Maryland, Massachusetts, and West Virginia.⁶⁰

Florida

The state of Florida holds a presumably open status with regard to dependency hearings with exceptions that are in the best interest of the child.⁶¹ Florida court hearings on sexual abuse and child custody were closed to the public prior to 1994. An amendment to the statute sanctioned better access to the public and media.⁶²

Florida Statute 985.035, “Opening hearings” promulgates the following⁶³:

⁵⁶ AB 73 California legislature, 2011 - 2012

⁵⁷ Id

⁵⁸ Patton, 2011, February 11, para. 3

⁵⁹ Cal. Welf. & Inst. Code § 346 (Deering): “Unless requested by a parent or guardian and consented to or requested by the minor concerning whom the petition has been filed, the public shall not be admitted to a juvenile court hearing. The judge or referee may nevertheless admit such persons as he deems to have a direct and legitimate interest in the particular case or the work of the court.” According to case law, the press has been recognized as a person with a “direct and legitimate” interest (*San Bernardino Dep’t of Public Social Services v. Superior Court of San*

San Bernardino County Dep’t of Pub. Soc. Servs. v. Superior Court, 283 Cal. Rptr. 332 (1991) (Div. 2, 1991).

⁶⁰ SACHS, p.8., statistic taken from the Advocacy Institute and First Star, 2008, on which states hold presumably closed and closed dependency court proceedings.

⁶¹ The exceptions listing is in an effort to not repeat information but is in no way a direct use of the language used in the Florida State Chapter 39 statute(s) on child welfare and proceedings relating to children. Florida statute and court rules requires open courts for all cases, and but permit closure under special circumstances.

⁶² Flint, 2006

⁶³ 2011 Florida Statutes as specified on last accessed on 3/1/2012.

(1) “All hearings, except as provided in this section, must be open to the public, and no person may be excluded except on special order of the court. The court, in its discretion, may close any hearing to the public when the public interest and the welfare of the child are best served by so doing. Hearings involving more than one child may be held simultaneously when the children were involved in the same transactions.

(2) except as provided in subsection (1), nothing in this section shall prohibit the publication of proceedings in a hearing.”

The only exceptions to openness are TPR⁶⁴’s and adoption hearings. In Florida child welfare records are not released to the public and are only available upon strict reporting and court ordered needs⁶⁵. Therefore, dependency hearings are presumed open with the exception of victim testimony and trials set forth in the determining of TPRs. The Florida Adoption Act obliges that all adoptions hearings are to be closed to the public and media and records sealed.

Florida statute offers the following on adoption hearings:

*“shall be held in closed court without admittance of any person other than essential officers of the court, the parties, witnesses, counsel, persons who have not consented to the adoption and are required to consent, and representatives of the agencies who are present to perform their official duties.”*⁶⁶

In noting the difference between public interest and public concern the Florida Supreme Court suggest that closing adoption hearings is a remedial measure taken which would “minimally impair[s] the media’s access to a story of public interest, but had no effect on its freedom to cover a matter of actual public concern⁶⁷,”

⁶⁴ Supra, Chapter 39, Florida State Statute, Part II, (A) General Provisions, Rule 8.201, Part XI Termination of parental rights proceedings; 39.801, 39.810, Part IX, Permanency, 39.621, (2)(b)

⁶⁵ All records and information required in dependency proceedings are confidential and exempt from public inspection or access. Cal. Welf. & Inst. Code § 39.0132. Section 39.0132 lists who can access this information without court order: others entitled under chapter Cal. Welf. & Inst. Code § 39.0132(3).

⁶⁶ Southern Area Consortium of Human Services (SACHS), Literature Review: Open Juvenile Dependency Courts

⁶⁷ Southern Area Consortium of Human Services (SACHS), Literature Review: Open Juvenile Dependency Courts as cited Flint, 2006,p.17

Another exception for the State of Florida's dependency hearings are victim's testimony⁶⁸. Florida State statute §39.814, (3)⁶⁹; Oaths, records, and confidential information reads:

(3) "The clerk shall keep all court records required by this part separate from other records of the circuit court. All court records required by this part shall not be open to inspection by the public. All records shall be inspected only upon order of the court by persons deemed by the court to have a proper interest therein, except that, custodians of the child and their attorneys, law enforcement agencies, and the department and its designees shall always have the right to inspect and copy any official record pertaining to the child. The court may permit authorized representatives of recognized organizations compiling statistics for proper purposes to inspect and make abstracts from official records, under whatever conditions upon their use and disposition the court may deem proper, and may punish by contempt proceedings any violation of those conditions."

In the past Florida legislation has looked to the *future* best interest of the child in opening records and judicial proceedings with regard to safeguarding the child and its provided services.

In *The Natural Parents of J.B., Petitioners, v. Florida Department of Children and Family Services*⁷⁰ the attorney for parents (offending) petitioned the court for the proceedings to be closed. The judge granted the request. Shortly after the Department of Children and Families filed a petition for a TPR⁷¹ and the judge closed the proceedings.

The attorney for the parents filed a petition requesting the case be held as an open proceeding to the public. In the end the petition was denied as closure is statutorily mandated and

⁶⁸ *Id.* § 39.0132(6); Abuse Hotline Reports and Records are not Open to Public Inspection: Section 39.202 governs the confidentiality of all reports and records held by the department, including reports made to the central abuse hotline regarding a child's abandonment, abuse or neglect. Such reports and records are not open to public inspection.

⁶⁹ Dependency Court Records are Only Admissible in the Following Civil and Criminal Proceedings: appeal; perjury; disqualification; adoption; and those related to placement, parental time, adoption or termination of parental rights for the child or the sibling of a child whose rights have already been terminated.

⁷⁰ See *Natural Parents of J.B. v. Fla. Dep't of Children & Family Servs.*, 780 So. 2d 6 (Fla. 2001) (holding that closure is statutorily mandated, therefore the court need not make particular showing to justify closure). Termination of Parental Rights Hearings are Closed to the Public. § 39.809(4).

⁷¹ *Id.*

therefore the court need not make a particular showing to justify its closure⁷². However, this particular case is an example of how the offending parents clearly wanted the reversal of statute in an attempt to push their case in front of the media. Unfortunately, while the dispute as to whether the trial should be opened or closed was a distraction to the court; the child languished in foster care waiting for the adults to finish arguing.

The United Kingdom

Great Britain is at the forefront when it comes to the history of juvenile proceedings specifically where it concerns court cases regarding the welfare of the child. In England there are legal restrictions which apply to the right to report on special parts of the court process. In England however, there is no denying that but for the efforts of the media child welfare proceedings would be closed⁷³.

Subsequently, reporting restrictions were needed and seemed to develop depending on the circumstance. This created great confusion and mystery on the part of the court. A list of restrictions for the court and the media was desperately needed.

In 2008 the Judicial Board and the Society of Editors in the United Kingdom came together to develop a reporting restriction guideline. The forward is attributed to The Right Honorable Lord Justice Judge and the following is a portion of the inclusive statement:

“As judges we are fully aware of the principles of open justice and the reasons why justice should be administered in public where both the processes, and the results, are open to scrutiny. The responsibility for accurately reporting these matters to the community at large is performed by representatives of the media. Without their efforts, whatever the theory, in practice the process would become closed.”

In the United Kingdom the policies listed are specifically written for special circumstances. There are automatic reporting restrictions on hearings from which the public are

⁷² Id

⁷³ the Judicial Board and the Society of Editors in the United Kingdom; reporting restriction guideline

excluded⁷⁴. Generally court proceedings must be held in open court. This is to ensure the public and press has access to attend such proceedings. The members of the media are given special consideration at times because of various locations of the court in special circumstances. Section 25 of the Youth Justice and Criminal Evidence Act⁷⁵ of 1999 permits the court to exclude persons of any description from the court during the evidence of a child or vulnerable adult witness in cases relating to a sexual offence or where there are grounds for believing that the witness has been or may be intimidated⁷⁶.

The European Convention on Human Rights offers the best deliberation with respect to Articles 10, (2) concedes freedom of expression as it inherently carries with it the responsibility “...for the protection of health or morals...” There are automatic reporting restrictions: there is no need to make optional orders in respect to the child victim of a sexual offense because the automatic restrictions as to the identity of any victim of sexual offenses apply. Additionally, these restrictions include victims of sexual offenses, rulings at pre-trial hearings, preparatory hearings, dismissal proceedings, indecent material as to injure public morals, proceedings in the absence of the jury, and protection of young persons and adult witnesses⁷⁷. In England the obligation to protect and safeguard its children is paramount before any portion of trial or court proceeding.

International Laws and Conventions

With regard to international laws and conventions the United States has signed and ratified the International Covenant on Civil and Political Rights, (ICCPR) but not the Covenant’s Optional Protocol, which would allow Americans to seek remedy through the UN for alleged

⁷⁴ The general rule is that the administration of justice must be done in public. The media is in court to report the proceedings to the public, the majority of whom will be unable to be there in person but who have the right to be informed as to what has occurred. Accordingly, unless there is good reason, nothing should be done to prevent the publication to the wider public of fair and accurate reports of the proceedings by the media.

⁷⁵ S.25 of the Youth Justice and Criminal Evidence Act, Youth Justice and Criminal Evidence Act 1999 comes into force are contained in section 39 of the Children and Young Persons Act 1933 (which will apply solely to civil proceedings when the 1999 Act is implemented), Great Britain and Wales.

⁷⁶ Article 6 and Article 10 of the European Convention on Human Rights are relevant considerations. [Archbold 2000: 4-3 to 4-13 (Hearings in Open Court); 25-319, 25-321, 25-337 (Official Secrets Act); 1-230, 2-153, 2-158 (Hearings in Chambers); 4-239 (Challenge to juror for cause); 8-55n (s.25 Youth Justice & Criminal

⁷⁷ Id

rights violations by the US government. The Human Rights General Comment No. 16⁷⁸ with respect to the right to privacy refers to Article 17 of the ICCPR and promulgates the following:

“Article 17 provides for the right of every person to be protected against arbitrary or unlawful interference with his privacy, family, home or correspondence as well as against unlawful attacks on his honor and reputation. In the view of the Committee this right is required to be guaranteed against all such interferences and attacks whether they emanate from State authorities or from natural or legal persons. The obligations imposed by this article require the State to adopt legislative and other measures to give effect to the prohibition against such interferences and attacks as well as to the protection of this right.”

The Universal Declaration of Human Rights, (UDHR) article 12, says

“No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honor and reputation. Everyone has the right to the protection of the law against such interference or attacks.”

While the United States cannot be a party to the UDHR as it is a declaration and not legally binding, it is customary international law and one of the most important parts of international articulation on fundamental and inalienable rights. It seems that most of the international documents protecting the welfare of the child in issues of dependency are left to the determination of the domestic laws of individual nation states. If however, there is a violation of any human right in the European states there is an additional venue for legal recourse at the international level.

IV. Future Trends

Generally speaking, child custody, and decisions regarding visitation and child placement are the most difficult for any judge. Whether it is by legality, case law, or even customary law, all

⁷⁸ Office of the High Commissioner for Human Rights; General Comment No. 16: The right to respect of privacy, family, home and correspondence, and protection of honor and reputation (Art. 17):. 04/08/1988. CCPR general Comment No. 16, Thirty-second session, 1988. last accessed on 3/28/2012.

state and tribal courts operate with the philosophy of the best interest of the child. Good decision making will place emphasis on a child's physical, emotional, and psychological health and are always [in, of, and for] the child's best interest. It appears the newest movement in judicial procedures, with regard to child welfare; are situations where the *future* best interest of the child is large part of the deliberation process.

In part the ever-changing trends which seem to come and go within the field of child welfare are its approach to the psychological health of the child. The court is now lending itself to a better more developed understanding of how the environment of the courtroom plays a large part on the mental health of the child victim and the family. This is lending itself to understanding the affects of all types of abuse within the family. Many studies have shown that children are at a greater risk of being abused when one parent is abused by the other⁷⁹. Abuse of any kind changes the family dynamic and its functionality⁸⁰.

A global study published by UNICEF in 2006 revealed the impact of domestic violence on a child. Judges, attorneys, and child welfare professionals are working together to consider that even one time exposure to violence and other forms of abuse have a long-term effect on children⁸¹ resulting in the ongoing question of healthy atmospheres when dependency courts are open to the general public. The outcome of presumed open courts remains to be seen. To date the long term statistics have not been documented or measured. A project like this would need to emanate from least two separate courts which held similar jurisdiction over an equally similar population and environment.

Moreover, the effects of violence and abuse perpetrated against women and its residual effects in the family have been measured and from this information state courts have implemented new standards in certification regarding professional in dependency mediation and counseling. Judges and other legal professionals are outwardly open to a more compassionate

⁷⁹ Child Neglect, a Guide for Prevention, Assessment and Intervention, Chapter 4, Risk and Protective factors. United States Department of Health and Human Services, . Last accessed 3/29/2012

⁸⁰ Edleson, Children Witnessing of Adult Domestic Violence, United States Department of Health and Human Services, . Last accessed 3/29/2012

⁸¹ See UNICEF, Child Protection Section, Behind Closed Doors: The Impact of Domestic Violence on Children, 2006. P. 5

comprehension on the symptoms of abuse. Understanding that children do not necessarily show one particular pattern when they are victims of abuse⁸².

All things considered, the best interest of the child is not to throw him [or] her at the mercy of the public. A court, even with court reporting regulations and journalistic ethics governing the media cannot rely on the honor of a report or newspaper to keep a child's information or private confidential. Unfortunately, reporting on abuse, neglect, and abandonment cases are all too horrific and are often times sensationalized for more viewer or readership numbers. Courts which are presumed open often recognize the opportunity the media has to increase ratings and judges have placed additional special restrictions on media within their particular courtrooms.

Just as the AACWA increased judicial oversight as a way to advance the way child maltreatment cases were handled, Congress enacted the Adoption and Safe Families Act (ASFA) in part as a response to the inflated number of children entering the foster care system. Many of the provisions place a greater responsibility on the court to move quicker towards the goal of permanency.⁸³ Because the number of minor children entering the foster care system is continually increasing and the goals of permanency have not yet changed. The prediction is a greater number of TPR trials will ensue, further placing the minor at a possible prolonged or future greater risk while remaining in the system until the age of majority.

The increase in violence and the number of children and families affected by this violence will change the direction and future of the dependency system. It has certainly changed the social welfare system. Courts will need to move in a new direction when applying remedial efforts to direct and guide its dependency cases.

V. Recommendations for Common Interest

⁸²Id

⁸³ FLA STAT 39.621 Permanency determination by the court: (2) goals listed (a-e) include: reunification, adoption if a TPR has been filed, permanent guardianship (39.6221), permanent placement with a fit and willing relative (39.6231), placement in another planned permanent living arrangement (39.6241).

Juvenile dependency courts are filled with systemic issues that directly affect their ability to assess cases and make sound decisions in a timely manner. There two main issues which contribute to this hindrance: (1) the lack of communication and workability between the courts and other social service agencies, directly and indirectly involved in child welfare; (2) and the inadequate number of personnel and resources needed to manage the data and increased numbers of cases. What will this prove in the efforts to hold presumably open dependency proceedings?

One of the primary arguments for open courts has been that by allowing more public examination on dependency proceedings this will result in greater accountability and better outcomes for children. However, while media can highlight bad parents and showcase unacceptable social work, the welfare agencies themselves must take steps towards minimal efforts in fixing these problems. Additionally the media can shine a spotlight on seemingly miscarriages of justice but it is the courts that have the last word. Legislators and writers of policy are less inclined to tell judges how to run their courtrooms and judges are rarely removed from the bench, often times they are shuffled to other courts.

The goal of the court is to resolve with justice even if there are individuals who are not benefactors to its course even though simultaneously the court seeks to reunify the family unit. Family reunification in matters of dependency is in the best interest of the child and the best interest of the court as well. Both the court and child welfare agencies share involvement in the life of a child who has faced abuse, neglect, or abandonment. This message sometimes escapes the minds of those who are part of the decision making process.

It is unfortunate but the fact is that there are very few people who have a direct knowledge of dependency law and the child welfare system. Further it seems inherently wise to assume that those members of the media are not covering these types of cases so that they might diligently report on the effective measures taken in juvenile justice or dependency. It is also foolish to believe there is a large number of public who have any knowledge of dependency either. All of that being said it seems the opportunity to sensationalize a case of child maltreatment is the goal of those requesting public access.

Dependency cases are private, confusing, and very difficult matters which can sometimes last for a minimum of two years in the court's system. Even though all case plans⁸⁴ convey the six-month goal of permanency. The issues of the court and the child welfare system cannot be solved in one courageous attempt to implement policy and carry out some great feat of justice. Fortunately and unfortunately, the courts and the child welfare system which feed into its legal struggle are constantly evolving and changing. The debate of presumably open courts or closed courts in cases with maltreated children will be one that continues long after some of the children who were victims of abuse leave the child welfare system.

Until the real issue of maltreatment is addressed as a societal norm, dependency courts will always face the controversial and conflicting matter of confidentiality in open courts. Courts, its officers, social workers, and the general public must acknowledge that abuse, neglect, and abandonment is real and a societal problem. Turning a blind eye to the issue of child abuse and neglect does nothing to generate new legislation or even change that which is currently in play.

The Health and Human Services departments as well as the Department of Children and Families must review policy and take proactive measure to recreate its minimum standards goals. The court systems must consider that in theory presumably opened dependency proceedings are might appear to be in the best interested of the child however, the real effects of this legislative change have yet to be properly measured and reported on.

⁸⁴ Specific to Florida Rules of Juvenile Procedure: Supreme Court of Florida Judicial Rule 8.415 Judicial Review of Dependency Cases